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No. 95-73

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

CARGILL, INCORPORATED,
a Delaware Corporation,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR CARGILL, INCORPORATED

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Following its invariable custom, the Government has restated the case at length. Rather than quibbling over this somewhat selective exercise, we stand on the wholly accurate recitation in the opinion below, which we adopted in the Petition. ***But see*** Pet. at 6 n.4.

We note that the Solicitor General, on this occasion, does not attempt to minimize the practical importance of the first three questions presented.[1] Nor could he, given the tens of millions of acres and the millions of landowners directly affected. *See* Pet. at 11-12 n.9; A.C. Brief of the American Forest & Paper Association, Inc. at 7-10; A.C. Brief of the

[1] We answer the suggestion that the mandatory penalty question is of limited importance in a moment. *See* p. , *infra.*

National Association of Home Builders, et al. at 7-8; A.C. Brief of Pacific Legal Foundation at 14; A.C. Brief of Mountain States Legal Foundation, et al. at 8. So, also, the Solicitor General now rightly abandons the claim that these issues—rehearsed more than once at three judicial levels over a decade—are prematurely presented to this Court.[2] And, finally, although the concession is less than full, the Solicitor General effectively recognizes that an inter-circuit conflict exists with respect to two of the questions presented. The merits aside, there is, accordingly, a strong case for certiorari.

The Government has, however, addressed each of the questions presented on the merits and a brief reply is appropriate.

1. **The statutory question.** The Solicitor General first renumbers and rewrites our second "Question Presented" in what, at first blush, seems a harmless, if needless, exercise in self-indulgence. *Compare* Pet. at i, Question 2, with Br. in Opp. at i, Question 1. But, as it turns out, the rewriting is not innocuous. The Brief in Opposition persists in discussing, almost exclusively, a much broader issue, *not* presented by

[2]To be sure, the Brief in Opposition does contain the startling assertion that "[h]aving eschewed any effort to obtain a permit, petitioner should not be heard to attack the regulation on the ground that the proposed activity would have insubstantial effects on migratory birds." Br. in Opp. at 22-23. This stance, now intruded after ten years of litigation and a fine actually imposed upon a finding of violation, is difficult to understand. It must be stressed that, in practice, permits are not available for the asking and the process of applying is long and expensive. *See, e.g.*, A.C. Brief for the National Association of Home Builders at 10. Even when successful, onerous conditions typically are imposed. Whatever the ripeness of a *taking* claim, there can be no prematurity objection to a defendant in a government enforcement action raising issues of *jurisdiction* without submitting himself to the Corps' permit procedures—which, of course, are inapplicable if jurisdiction is absent.

Cargill, *viz.*: Whether the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, reasonably can be read to embrace some isolated waters, notably a huge, navigable lake such as was involved in *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984). *See* Br. in Opp. at 10-19. We have, it is true, expressed some doubts whether that broader question should be answered in the affirmative. This is not, however, an issue that needs to be resolved in the present case and we have accordingly confined ourselves to asking this Court (like the courts below) simply to rule that the Clean Water Act reasonably cannot be stretched to reach seasonal, *non-navigable* ponds *which cannot support any kind of water commerce* and which have *no other connection with interstate commerce, except only unprompted visits by out-of-state birds.*

As to this narrower question actually presented, the United States is largely silent. And with good reason, for there is nothing in the text of the statute, nor its legislative history, nor its administrative construction before the present case, that remotely supports such an extreme extension of jurisdiction.

a. Obviously insufficient is the Government's continually repeated point that the Clean Water Act seeks to protect waters, at least in part, for the sake of the birds that use them. It simply does not follow that Congress intended to regulate all waters of interest to birds—else there could be *no* exception, even for bird baths and ornamental pools. As we have said, the goal was to establish a federal pollution control program for "*federal*" waters, so limited for perfectly traditional reasons of comity, economy or constitutional doubt. *See* Pet. at 19-20. Of course, *within the zone of coverage*, birds, among other creatures, were intended beneficiaries. But to conclude that isolated wetlands are regulated by the Clean Water Act merely because birds enjoy them (or might do so) is no sounder than to bring swimming pools within the ambit of the law because they supply

an important venue for human water recreation, equally a value mentioned in the Act. *See* 33 U.S.C. § 1251(a)(2).

b. Nor will it do to reiterate—and misread—the Congressional statement that "the term 'navigable waters' be given the broadest possible constitutional interpretation." S. Conf. Rep. No. 1236, 92d Cong. 2d Sess. 144 (1972), quoted in Br. in Opp. at 13. As we have previously said (the Government ignoring our explanation once again), the context of that statement (including the cases from this Court cited in support)[3], makes it plain Congress only meant thereby to indicate it wished to embrace presently or potentially navigable waters, together with their non-navigable "adjuncts." Pet. at 20-21. As the final text suggests, the legislative history of the 1972 Act is crystal clear that Congress was intent on reaching all waterbodies that, under modern law, properly could be brought within the rubric "navigable waters"—but was *not* discarding the concept altogether.[4]

[3]Among the precedents cited are *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-123 (1921); *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404-410, 426-427 (1940); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523-525 (1941); and *Utah v. United States*, 403 U.S. 9 (1971). *See* 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell). Needless to say, none of these decisions reaches wholly isolated waters that are not potentially navigable.

[4]Read in context, Congressman Dingell's remark about "'the waters of the United States' in a geographical sense" (*see* Br. in Opp. at 13) is not to the contrary. As the Congressman himself explained, he was merely repudiating the narrow "technical" phrase "navigable waters of the United States" (*ibid.*) so as "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term," to quote this Court's conclusion in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). As the *Riverside* Court pointedly noted, this does not automatically extend coverage to isolated waters and wetlands. *Id.* at 124 n.2, 131 n.8. Certainly, Congressman Dingell did not remotely advert to non-navigable isolated waters: instead, he invoked the cases cited in n.3, *supra*, as exemplifying the "new and broader definition" of "navigable waters" which the Act was adopting. 118 Cong. Rec. 33756-33757 (1972). In any event, we cannot take Congressman Dingell's reference to geography literally since even the Corps' most expansive regulations exempt *some* waters within the United States.

The reference to "constitutional interpretation" is expressly directed to the definition of "navigable waters," not to Commerce Clause powers in general—much less Congressional powers under the Treaty Clause (*see* n.6, *infra*).

c. The claim of legislative ratification in 1977 is wide of the mark. We note that this Court in *Riverside* did not view the legislative proceedings of that year as obviously endorsing the Corps' then recent *isolated* waters regulation. *See* n.4, *supra*. In fact, little, if anything, was actually *spoken* on the floor of either House on that score. But, in any event, it is undeniable that the *migratory bird rule*—the focus of this case—was not ratified in 1977. It could not have been, since it did not yet exist.

d. Equally unavailing is the invocation of 1985 Congressional "Oversight Hearings" to prove that the migratory bird rule was alive and well long before that date. Br. in Opp. at 16. To be sure, after unrelenting pressure, Assistant Secretary Dawson finally stated that "the Corps of Engineers generally does accept the notion." *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 168 (1985). But this was after many earlier equivocations or denials. *E.g.*, *id.*, at 37, 52-53, 61, 114-116, 122, 126-127. And the statement as to current practice was at least once recanted. *Id.*, at 171-172. The fact is that there was no earlier reported instance of the Corps applying the migratory bird rule. Indeed, in this very case, it was not invoked at the outset. Certainly, the Subcommittee that

called the 1985 Oversight Hearings was of the view the Corps was *not* applying any migratory bird rule. *See id.* at 114, 122, 129, 160, 168-169, 193-194.

Moreover, if the rule was already in effect, why was it necessary for the Chief of Engineers to send out a directive about it to all Corps Districts in late 1985 (*see Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989))? Or for the Corps to announce the rule as a new "clarification" in the preamble commentary published with the new Regulations in early 1986 (51 Fed. Reg. 41,217)? To pretend that the migratory bird rule, in any form, predated the 1985 Hearings is disingenuous.

e. Finally, it is only by misrepresenting the statutory question actually presented that the Solicitor General is able to evade our submission that the Court should construe the Clean Water Act so as to make unnecessary resolution of a serious constitutional question. *See* Br. in Opp. at 18-19. As we have said, Cargill is *not* here seeking to "invalidat[e] the 'other waters' provision in its entirety" (*id.* at 19), but, rather, to invalidate the migratory bird rule alone. The Government has not suggested any reason why we may not so limit our argument. Accordingly, it is wholly beside the point that the *"other waters" regulation*, as a whole, may not be constitutionally vulnerable. At the least, the *migratory bird rule* raises a serious constitutional question, and that is the basis for our invoking the well-settled principle that constitutional issues should be avoided if a reasonable narrowing construction of the statute is available. *See* Pet. at 16-17.

2. **The constitutional question.** For the most part, the Government does not meet our argument invoking this Court's recent decision in *United States v. Lopez*, No. 93-1260 (Apr. 26, 1995). *See* Pet. at 12-16. But it may be useful to rebut the claim again advanced to the effect that

well-established precedents, undisturbed by *Lopez*, vindicate the migratory bird rule. Br. in Opp. at 19-23. That is simply not the case.

We do not question the national interest in protecting migratory birds, which justifies international treaties to that end (*see Missouri v. Holland*, 252 U.S. 416 (1920)), or the propriety of expending federal funds to acquire and preserve wetlands important to their survival (*see North Dakota v. United States*, 460 U.S. 300 (1983)). Nor do we dispute that the Commerce Clause reaches the man-initiated interstate movement of migratory wildlife for commercial purposes (*see Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Andrus v. Allard*, 444 U.S. 51 (1979); *Maine v. Taylor*, 477 U.S. 131 (1986).) And we may concede, arguendo, the power of Congress to enact a law expressly protecting the essential habitat of rare species, or game birds, that attracts out-of-state observers or hunters, or the habitat of commercially valuable species destined for interstate markets. Concededly, Congress itself has passed no such statute and it is doubtful whether it could, by giving a wholly blank check to the enforcing agencies, authorize them to write such a regulation. But, in any event, the migratory bird rule at issue here is not so circumscribed. Nor is that the factual setting of the present case.

We are dealing here with a rule that purports to reach waters of no conceivable commercial value solely on the basis that they are visited, not by out-of-state ornithologists or bird-watchers or hunters, but by any migratory bird, typically non-commercial species, unaided and uninfluenced by man.[5] As the author of the *Riverside* opinion observed,

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[5] A sufficient proof that the migratory bird rule does not, sub silentio, include any human element is its insistence that the operative birds must themselves cross state or national boundaries. Plainly, the jurisdictional predicate and the constitutional theory is that the *birds'* movement supplies the interstate or foreign commerce link.

there is no precedent in this Court for extending the Commerce power so far. Tr. of Oral Arg. in *United States v. Riverside Bayview Homes, Inc.*, No. 89-701 (Oct. 16, 1985) at 21-22. As we elaborate in the Petition (at 12-16), the teaching of *Lopez* is that it would be a perversion of the Commerce Clause to condone such a result by "pil[ing] inference upon inference." *Id.*, slip op. at 19.[6]

3. **The administrative law question.** On this issue, the Solicitor General wholly fails to answer our submission (Pet. at 23-24) and there is, accordingly, little to be said in reply. Two points are worth noting, however.

a. We have already shown that the migratory bird rule was newly minted in late 1985, as a product of the Oversight Hearings of that year. Our contention is that, as a substantive change of law, the Administrative Procedure Act, 5 U.S.C. § 553, required that it be offered for public comment before becoming effective. Whether the violation ought to be dated from November, 1985, when the Chief of Engineers directed all Corps Districts to apply the new rule, or March 1986, when the migratory bird rule was first published in the Federal Register, is immaterial.

b. The Government's attempt to downgrade the conflict of decisions on this issue is unpersuasive. *See* Br. in Opp. at 26-27. The Fourth Circuit ruling in *Tabb Lakes* invalidating

[6]The belated and half-hearted invocation of the Treaty Clause in the Brief in Opposition (at 23-24 n.18) is unavailing. Although the 1986 Preamble commentary announcing the migratory bird rule (51 Fed. Reg. 41,217) speaks of treaty-protected birds, as well as birds that cross state lines, the commentary is expressly intended to "clarify" a regulation (33 C.F.R. § 328.3(a)(3), quoted in Br. in Opp. at 5 n.4) that is predicated solely on a connection with "interstate or foreign commerce." Thus, the reference to treaty-protected birds must be understood as embracing birds that cross international boundaries and thereby invoking the notion of foreign commerce. Nor is there a single mention of the Treaty Clause in the legislative history of the Clean Water Act.

the migratory bird rule as violating the APA is unequivocal. It is no less so because it is "split" and has not been officially published. As the Government long ago recognized, the upshot is that the reach of the Clean Water Act is significantly different in the Fourth Circuit than in the Ninth. *See* No. 90-792, Pet. App. at A-46 to A-49. That is the reality that calls for resolution of the conflict by this Court.

4. **The penalty question.** Here, again, the Solicitor General does not confront our primary argument: that "shall be liable to" a monetary penalty is *not* equivalent to "shall be assessed" a penalty. Three points, however, merit a brief reply.

a. As the Government partially recognizes (Br. in Opp. at 28 n.23), the Fourth Circuit cases do *not* accept the mandatory penalty rule endorsed by the Eleventh Circuit and now the Ninth. That more flexible position is most recently confirmed by the opinion in *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 697 (4th Cir. 1989), cited in our Petition, but ignored by the Government. Thus, as it seems to us, there *is* a present inter-circuit conflict on this issue.

b. The Solicitor General too quickly waives aside the statements by *this* Court at odds with the inflexible mandatory penalty rule endorsed below. *See* Pet. at 25-26. Dicta, repeated in three decisions here, cannot so easily be dismissed.

c. Finally, it is said the issue has little practical importance because of broad judicial discretion. Br. in Opp. at 29. This is passing strange when one remembers that, in this very case, the Government was most insistent that the district court should hold itself bound to assess a penalty, provoking a separate proceeding to resolve that question. Moreover, the relaxed attitude now assumed is inconsistent with the stance taken by the Government in other cases to

the effect that judicial discretion in the matter of civil penalties is severely curtailed by the 1987 Amendments to the Clean Water Act and that any assessment below the statutory maximum must be justified by a finding particularizing the mitigating factors listed in the new law. Cf. EPA's December 14, 1990 Guidance on "Clean Water Act Section 404 Civil Administrative Penalty Actions" (which, despite its title, "should also be used to calculate judicial penalty" (at 1)); EPA's Mar. 1, 1995, "Interim Clean Water Act Settlement Penalty Policy."

For the reasons stated here and in the Petition, certiorari should be granted.

Respectfully submitted,

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